

## Message Text

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E.O. 11652: N/A

TAGS: PARM, PFOR

SUBJECT: BRUSSELS CONVENTION ON NUCLEAR SHIPS

AS YOU REQUESTED, THIS CABLE TRANSMITS TEXT OF LEGAL  
MEMORANDUM SENT TO ASST. SEC. ELLSWORTH BY DEPUTY LEGAL  
ADVISER ALDRICH. DRAFT US RESPONSE TO FRG ALONG LINES  
DISCUSSED LAST WEEK WILL BE CIRCULATED SEPARATELY FOR  
CLEARANCE AFTER COORDINATION WITHIN STATE.

BEGIN TEXT:

- MEMORANDUM OF LAW
- LEGAL STATUS AND EFFECTIVENESS
- OF A RESERVATION EXCLUDING WARSHIPS
- FROM THE AMBIT OF THE 1962 BRUSSELS
- CONVENTION ON THE LIABILITY OF
- OPERATORS OF NUCLEAR SHIPS.

THIS MEMORANDUM IS WRITTEN IN THE CONTEXT OF THE UPCOMING  
RATIFICATION BY THE FEDERAL REPUBLIC OF GERMANY OF THE  
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BRUSSELS CONVENTION ON THE LIABILITY OF OPERATORS OF  
NUCLEAR SHIPS SUBJECT TO A RESERVATION EXCLUDING WARSHIPS

FROM THE AMBIT OF THE CONVENTION. THE FEDERAL REPUBLIC

OF GERMANY HAS REQUESTED THAT THE UNITED STATES AND THE UNITED KINGDOM SIGN WITH A SIMILAR RESERVATION WITHIN THE THREE-MONTH PERIOD AFTER THE DEPOSIT OF THE INSTRUMENT OF RATIFICATION BY THE FEDERAL REPUBLIC OF GERMANY BEFORE THE CONVENTION BECOMES EFFECTIVE. COPIES OF NOTES SENT BY THE GERMAN EMBASSY TO THE DEPARTMENT OF STATE ON MAY 30 AND JUNE 6, 1975, ARE ATTACHED. UNDER ARTICLE XXII, THE CONVENTION IS OPEN TO SIGNATURE BY THE UNITED STATES.

#### ISSUES PRESENTED

1. MAY A RESERVATION OF THIS NATURE BE MADE?
2. WHAT IS THE LEGAL SITUATION IF THE RESERVATION IS NOT PERMISSIBLE OR IF OTHER STATES OBJECT? IN PARTICULAR, COULD A RESERVING STATE BE CONSTRUED TO BE BOUND WITHOUT REFERENCE TO ITS RESERVATION?

#### CONCLUSIONS

1. SUCH A RESERVATION MAY BE MADE. UNDER TRADITIONAL LAW THERE WAS COMPLETE FREEDOM TO MAKE RESERVATIONS. UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES, THERE IS A PERSUASIVE ARGUMENT THAT THE RESERVATION IS NOT INCOMPATIBLE WITH THE OBJECT AND PURPOSE OF THE TREATY AND THEREFORE IS PERMISSIBLE.
2. A RESERVING STATE CANNOT BE CONSTRUED TO BE BOUND TO A TREATY WITHOUT REFERENCE TO ITS RESERVATION. IN PARTICULAR, UNDER TRADITIONAL LAW, IF THE RESERVATION IS NOT EXPLICITLY OR TACITLY ACCEPTED BY ALL THE OTHER PARTIES TO THE TREATY, THE RESERVING STATE IS NOT CONSIDERED A PARTY TO THE TREATY. UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES, IF ANOTHER STATE OBJECTS TO THE RESERVATION, THERE ARE NO TREATY RELATIONS BETWEEN THE RESERVING AND OBJECTING STATES UNLESS THE LIMITED OFFICIAL USE  
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OBJECTING STATE EXPRESSES THE CONTRARY INTENTION, IN WHICH CASE ONLY THE PROVISIONS TO WHICH THE RESERVATION RELATES DO NOT APPLY AS BETWEEN THEM.

#### PRACTICAL SUGGESTIONS FOR FRG/U.S./U.K. ACTION

1. IN ORDER TO STRENGTHEN THE ARGUMENT THAT THE RESERVATION IS NOT INCOMPATIBLE WITH THE OBJECT AND PURPOSE OF THE TREATY, WE SHOULD ATTEMPT TO PERSUADE AS MANY NUCLEAR STATES AS POSSIBLE TO SIGN OR RATIFY WITH THE SAME RESERVATION.

2. THE FEDERAL REPUBLIC OF GERMANY INTENDED RESERVATION READS: "...SUBJECT TO THE RESERVATION THAT THE FEDERAL REPUBLIC OF GERMANY WILL NOT APPLY THE PROVISIONS OF THE CONVENTION WITH RESPECT TO WARSHIPS...." WE SHOULD SUGGEST TO THE FEDERAL REPUBLIC OF GERMANY THAT A BETTER WORDING WOULD BE: "...SUBJECT TO THE RESERVATION THAT THE PROVISIONS OF THE CONVENTION WILL NOT APPLY WITH RESPECT TO WARSHIPS...."

3. THE BELGIANS SHOULD BE CONSULTED IN ADVANCE OF THE FEDERAL REPUBLIC OF GERMANY DEPOSIT OF ITS INSTRUMENT OF RATIFICATION TO ASCERTAIN THAT THE GOVERNMENT OF BELGIUM WILL ACCEPT THE INSTRUMENT OF RATIFICATION WITH THE RESERVATION AND THAT IT WILL CIRCULATE THEM WITHOUT IN ANY WAY CASTING DOUBT ON THE EFFECTIVENESS OF THE RESERVATION OR SOLICITING POSITIVE ACCEPTANCE.

4. WE SHOULD CONSULT WITH THE NETHERLANDS REGARDING THE OPTIMAL SCENARIO FOR REENFORCING THE POSITION THAT THE RESERVATION IS EFFECTIVE.

5. TO BOLSTER THE LIBERAL TREND IN THE LAW TOWARD THE EFFECTIVENESS OF RESERVATIONS, WE SHOULD SPEED UP RATIFICATION OF THE VIENNA CONVENTION ON THE LAW OF TREATIES.

MAY A RESERVATION ON WARSHIPS BE MADE

IN GENERAL, UNDER TRADITIONAL LAW, A STATE HAS AN ABSOLUTE RIGHT TO ATTACH TO ITS SIGNATURE OR TO ITS LIMITED OFFICIAL USE  
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RATIFICATION OR ADHERENCE ANY RESERVATION WHICH IT DEEMS NECESSARY IN ORDER TO ENABLE IT TO BECOME A PARTY TO A MULTILATERAL TREATY. 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 140 (1970); TESTIMONY OF THE LEGAL ADVISER (HACKWORTH) ON THE CHARTER OF THE UNITED NATIONS, HEARINGS BEFORE THE SENATE FOREIGN RELATIONS COMMITTEE, 79TH CONGRESS, 1ST SESSION, JULY 10, 1945, P. 342.

THE RESERVATIONS TO THE CONVENTION ON GENOCIDE, ADVISORY OPINION: I.C.J. REPORTS 1951, P. 15, DECIDED THAT A STATE COULD NOT BE REGARDED AS A PARTY TO THE GENOCIDE CONVENTION IF IT MADE A RESERVATION INCOMPATIBLE WITH THE OBJECT AND PURPOSE OF THAT CONVENTION. IT FOCUSED PARTICULARLY ON THE INTENTION OF THE DRAFTERS OF THAT CONVENTION TO ACHIEVE WIDE PARTICIPATION AND THOUGHT, THEREFORE, THE PARTICULAR CASE MANDATED A LIBERAL RULE BY WHICH, IF OTHER STATES ACCEPTED THE RESERVATION AS NOT INCOMPATIBLE WITH THE OBJECT AND PURPOSE, TREATY RELATIONS WOULD EXIST BETWEEN THOSE STATES AND THE RESERVING STATE. ID. AT 24, 29-30. THE COURT NEVER QUESTIONED THE ABILITY

OF A STATE TO MAKE ANY RESERVATION IT DEEMED NECESSARY.

THE VIENNA CONVENTION ON THE LAW OF TREATIES, IN ARTICLE 19, EXPANDED THE GENOCIDE CONVENTION ADVISORY OPINION RULE, BY PROVIDING THAT A RESERVATION, UNLESS EXPLICITLY OR IMPLICITLY PROHIBITED BY A TREATY, IS PERMITTED UNLESS IT IS INCOMPATIBLE WITH THE OBJECT AND PURPOSE OF THE TREATY.

A RESERVATION ON WARSHIPS IS NOT PROHIBITED BY THE TERMS OF THE BRUSSELS CONVENTION, NOR DOES THE CONVENTION PROVIDE THAT ONLY SPECIFIED RESERVATIONS MAY BE MADE. ARTICLE XXI, WHICH AUTHORIZES RESERVATIONS ON DISPUTE SETTLEMENT, DOES NOT BY ITS TERMS EXCLUDE OTHER RESERVATIONS AND IS CLEARLY NOT INTENDED TO PRECLUDE OTHER RESERVATIONS.

THE EXCLUSION OF WARSHIPS FROM THE APPLICATION OF THE BRUSSELS CONVENTION DOES NOT APPEAR TO BE INCOMPATIBLE WITH THE OBJECTIVES AND PURPOSES OF THE CONVENTION. IT IS LIMITED OFFICIAL USE  
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TRUE THAT A GREAT MAJORITY OF DELEGATIONS TO THE 1962 CONFERENCE DECIDED THAT THE CONVENTION SHOULD ALSO APPLY TO WARSHIPS ON THE GROUND THAT THE PROTECTION OF POSSIBLE VICTIMS OF NUCLEAR RISKS EMANATING FROM SHIPS REQUIRE THAT WARSHIPS BE INCLUDED. HOWEVER, SINCE 1962 IT HAS APPEARED THAT STATES OPERATING NUCLEAR WARSHIPS UNDER THEIR FLAG HAVE NOT BEEN PREPARED TO RATIFY THE CONVENTION, WHICH MEANS THAT TODAY IT IS PRACTICALLY NOT POSSIBLE TO ACHIEVE AT LEAST PARTIAL PROTECTION AGAINST THE RISKS OF NUCLEAR INCIDENTS EXCEPT BY LIMITING THE AREA OF APPLICATION TO SHIPS THAT ARE NOT WARSHIPS.

WILL BELGIUM ACCEPT THE RESERVATION

WHILE THE QUESTION RARELY ARISES, THE U.S. GOVERNMENT APPLIES A CONSERVATIVE RULE IN SERVING AS A DEPOSITARY. IT ORDINARILY CONSIDERS ITSELF UNABLE TO ACCEPT FOR DEPOSIT AN INSTRUMENT OF RATIFICATION CONTAINING A RESERVATION AFFECTING THE SUBSTANCE OF THE TREATY UNLESS AND UNTIL ALL OTHER GOVERNMENTS CONCERNED HAVE HAD AN OPPORTUNITY TO PRESENT THEIR VIEWS ON SUCH RESERVATION. IN SEVERAL PAST CASES, THE U.S. APPEARS TO HAVE REFUSED TO ACCEPT THE INSTRUMENT OF RATIFICATION OF A STATE ATTEMPTING TO BECOME A PARTY TO A MULTILATERAL CONVENTION OF WHICH THE U.S. WAS DEPOSITARY, WHEN, AS A RESULT OF CIRCULATING A PROPOSED RESERVATION, THE U.S. HAD RECEIVED SOME OBJECTIONS.

THE QUESTION THUS ARISES WHETHER BELGIUM WOULD ACCEPT AN INSTRUMENT OF RATIFICATION TO THE BRUSSELS CONVENTION WITH A RESERVATION ON WARSHIPS. BELGIUM HAS NEITHER SIGNED NOR RATIFIED THE VIENNA CONVENTION ON THE LAW OF TREATIES, WHICH IN ANY EVENT, HAS NOT COME INTO FORCE. IN ADDITION, THE VIENNA CONVENTION DOES NOT, BY ITS TERMS, APPLY TO TREATIES CONCLUDED PRIOR TO ITS ENTRY INTO FORCE FOR THE STATE CONCERNED. IF BELGIUM FOLLOWED THE OLDER RULE, PREVIOUSLY FOLLOWED BY THE U.S. AND THE LEAGUE OF NATIONS, AND, PRIOR TO 1951 BY THE UNITED NATIONS, BELGIUM MIGHT REFUSE TO ACCEPT AN INSTRUMENT OF RATIFICATION CONTAINING A RESERVATION UNTIL IT ASCERTAINED THAT ALL THE PARTIES TO THE BRUSSELS CONVENTION EITHER LIMITED OFFICIAL USE  
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EXPLICITLY OR TACITLY ACCEPTED THE RESERVATION. SHOULD BELGIUM FOLLOW THE VIENNA CONVENTION RULE IT WOULD APPEAR TO HAVE THE OPTION OF REFUSING TO ACCEPT AN INSTRUMENT OF RATIFICATION WITH A RESERVATION IF, ON ITS OWN INITIATIVE, IT DECIDES THAT THAT RESERVATION IS INCOMPATIBLE WITH THE OBJECT AND PURPOSE OF THE TREATY.

IN VIEW OF THIS, IT WOULD BE IMPORTANT TO CONSULT BELGIUM, AS SUGGESTED ABOVE.

LEGAL SITUATION IF THE RESERVATION IS INEFFECTIVE

UNDER THE PRACTICE OF THE LEAGUE OF NATIONS AND THE UNITED NATIONS UNTIL 1951, THE RULE WAS THAT A RESERVATION TO A MULTILATERAL TREATY, IN ORDER TO BE VALID, HAD TO BE ACCEPTED BY ALL THE CONTRACTING PARTIES. IF IT WAS NOT ACCEPTED, THE RESERVATION, "LIKE THE SIGNATURE TO WHICH IT IS ATTACHED, IS NULL AND VOID." THIS PRACTICE WAS ADOPTED BY THE COUNCIL OF THE LEAGUE OF NATIONS AS A GUIDE FOR THE SECRETARY GENERAL IN 1927. SEE 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 147 (1970). THE SECRETARY GENERAL OF THE UNITED NATIONS FOLLOWED THE SAME PRACTICE UNTIL 1952. U.N. DOC. A/1372. THE DISSENTING OPINION IN THE GENOCIDE CONVENTION ADVISORY OPINION CONSIDERED THAT THIS WAS NOT ONLY THE PRACTICE, BUT THE EXISTING RULE OF INTERNATIONAL LAW. I.C.J. REPORTS 1951, PP. 32, 41. THE MAJORITY IN THAT CASE ACKNOWLEDGES THE PRACTICE, BUT NOT THE RULE, ID. AT 24-25, ALTHOUGH VERZIIL SEEMS CORRECT IN HIS VIEW THAT THE CONCLUSION OF THE MINORITY IN RESPECT OF THE LEGAL SITUATION AS IT EXISTED IN 1951 WAS WELL-FOUNDED. 6 J. VERZIIL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 228 (1973). IN ANY EVENT, THE HOLDING OF THE MAJORITY IN THE GENOCIDE ADVISORY OPINION APPEARS BASED ON A CONCLUSION BY THE COURT THAT THE APPLICATION OF THIS RULE TO THE PARTICULAR CASE OF THE GENOCIDE

CONVENTION WOULD HAVE FRUSTRATED THE INTENTION OF THE  
DRAFTERS OF THAT CONVENTION.

THIS TRADITIONAL RULE DOES NOT LIMIT THE FREEDOM TO MAKE  
RESERVATIONS, BUT IS HEAVILY WEIGHTED AGAINST THEIR  
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EFFECTIVENESS SINCE ANY PARTY TO THE MULTILATERAL TREATY,  
BY ITS OBJECTION TO THE RESERVATION, COULD ENSURE THAT THE  
RESERVING STATE DID NOT BECOME A PARTY TO THE TREATY.

A MORE RECENT TREND MAY BE EVOLVING. GENERAL ASSEMBLY  
RESOLUTIONS IN 1952 AND 1959 REQUESTED THE SECRETARY  
GENERAL TO COMMUNICATE RESERVATIONS IN HIS FUNCTION AS  
DEPOSITARY, BUT NOT TO PASS ON THEIR LEGAL EFFECT.  
U.N.G.A. RES. 598 (VI); U.N.G.A. RES. 1452B(XIV).

IN PROPOSING WHAT SUBSEQUENTLY BECAME OF ARTICLES 19 - 21  
OF THE VIENNA CONVENTION ON THE LAW OF TREATIES, THE  
INTERNATIONAL LAW COMMISSION RECOGNIZED THE AMBIGUITY IN  
THE LAW AND DECIDED TO PROPOSE A FLEXIBLE SYSTEM. U.N.  
DOC. A/6309/REV. 1, PP. 35-39. THIS RULE SEEMS INSPIRED  
BY A COMBINATION OF THE MAJORITY OPINION IN THE GENOCIDE  
CONVENTION CASE AND THE SO-CALLED PAN AMERICAN RULE,  
ADOPTED BY THE BOARD OF GOVERNORS OF THE PAN AMERICAN  
UNION IN 1932. UNDER THIS RULE, IF A STATE MADE A RESER-  
VATION TO A MULTILATERAL TREATY, THE TREATY WOULD COME  
INTO FORCE BETWEEN THOSE STATES WHICH ACCEPTED THAT  
RESERVATION, WITH THE OBLIGATIONS MODIFIED BY THE RESER-  
VATION, BUT NOT WITH RESPECT TO STATES THAT DID NOT ACCEPT  
THE RESERVATION. 14 M. WHITEMAN, DIGEST OF INTERNATIONAL  
LAW 141-42 (1970). ARTICLES 20 AND 21 OF THE VIENNA  
CONVENTION ON THE LAW OF TREATIES DO NOT PERMIT ONE  
OBJECTING STATE TO PREVENT A RESERVING STATE FROM BECOMING  
A PARTY (IF THE RESERVATION OBJECTED TO IS NOT INCOM-  
PATIBLE WITH THE OBJECT AND PURPOSE OF THE TREATY).

UNDER THE VIENNA CONVENTION, THE LEGAL SITUATION WOULD BE:

(A) THE RESERVING STATE IS IN TREATY RELATIONS WITH OTHER  
STATES WHICH HAVE ACCEPTED THE RESERVATION ON THE BASIS  
OF THE TERMS OF THE TREATY AS MODIFIED BY THE RESERVATION;  
(B) THE RESERVING STATE IS NOT IN TREATY RELATIONS WITH  
ANOTHER STATE WHICH HAS OBJECTED TO THE RESERVATION AND  
OBJECTED TO TREATY RELATIONS; (C) THE RESERVING STATE IS  
IN TREATY RELATIONS WITH A STATE THAT HAS OBJECTED TO THE  
RESERVATION, WITH REGARD TO ALL PROVISIONS OF THE TREATY  
EXCEPT THOSE WHICH RELATE TO THE RESERVATION. IN  
NONE OF THESE INSTANCES WOULD A RESERVING STATE BECOME  
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BOUND AGAINST ITS WILL CONTRARY TO A STIPULATION COVERED  
BY ITS RESERVATION.

UNDER BOTH THE FRAMEWORK OF LAW PRIOR TO THE VIENNA  
CONVENTION AND UNDER THE PROVISIONS OF THAT CONVENTION,  
THE STATEMENT OF POSITION BY OTHER CONTRACTING STATES  
PARTY TO A MULTILATERAL CONVENTION IS CRUCIAL. UNDER  
PREVIOUS LAW, THERE WAS NO EXPLICIT TIME LIMIT SET FOR  
THIS. HOWEVER, IN 1962, THE LEGAL ADVISER'S OFFICE TOOK  
THE POSITION THAT A PERIOD OF TWO YEARS AFTER BECOMING  
AWARE OF A RESERVATION AND SIX MONTHS AFTER RECEIVING  
NOTICE OF DEPOSIT SUBJECT TO THAT RESERVATION, WAS  
LONGER THAN PERMISSIBLE FOR A STATE TO OBJECT; IT WAS  
ARGUED THAT AN OBJECTION NOT BY THEN RECEIVED WAS NOT  
RECEIVED WITHIN A REASONABLE TIME AND THEREFORE WAS  
WITHOUT LEGAL EFFECT. 14 M. WHITEMAN, DIGEST OF INTER-  
NATIONAL LAW 185 (1970). THE VIENNA CONVENTION ON THE  
LAW OF TREATIES WOULD, IN PARAGRAPH 5 OF ARTICLE 20  
RESOLVE ANY AMBIGUITY BY PROVIDING THAT IF NO OBJECTION  
HAD BEEN RAISED WITHIN TWELVE MONTHS OF NOTIFICATION OF  
THE RESERVATION TO THE STATE IN QUESTION, THE RESERVATION  
IS CONSIDERED TO HAVE BEEN ACCEPTED.

IN CONCLUSION, THE VIENNA CONVENTION ON THE LAW OF  
TREATIES PROVIDES A REGIME MORE FAVORABLE TO THE EFFEC-  
TIVENESS OF RESERVATIONS THAN THE TRADITIONAL REGIME.  
UNDER EITHER REGIME, HOWEVER, A RESERVATION ON WARSHIPS  
TO THE BRUSSELS CONVENTION WOULD BE PERMISSIBLE, WOULD  
PROBABLY RESULT IN BECOMING A PARTY TO THE CONVENTION,  
AND WOULD IN NO CASE RESULT IN BEING BOUND ON TERMS THAT  
ARE NOT SUBJECT TO THE RESERVATION.

IT MIGHT BE NOTED THAT EVEN JUDGE LAUTERPACHT, IN  
GRAPPLING WITH A RESERVATION HE CONSIDERED TO STRIKE  
DIRECTLY AT THE HEART OF A LEGAL OBLIGATION, SUMMARILY  
DISMISSED THE POSSIBILITY THAT THE INVALIDITY OF A RESER-  
VATION COULD NULLIFY THE EFFECT OF THE PARTICULAR RESER-  
VATION WITHOUT NULLIFYING THE UNDERTAKING AS A WHOLE.  
CASE OF CERTAIN NORWEGIAN LOANS, JUDGMENT OF JULY 6TH,  
1957: I.C.J. REPORTS 1957, P. 9, AT 55 (SEPARATE  
OPINION). KISSINGER  
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